Supreme Court, U.S.
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No. 03-342

IN THE

Supreme Court of the United States

DENISE ARGUELLO and ALBERTO GOVEA,

Petitioners,

v.

CONOCOPHILLIPS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent ConocoPhillips, formerly known as Conoco, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock. It is publicly traded on the NYSE.

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Respondent ConocoPhillips ("Conoco") requests that this Court deny the Petition for Certiorari ("Pet.") filed by Denise Arguello and Alberto Govea, seeking a review of the decision of the United States Court of Appeals for the Fifth Circuit entered in this case on May 5, 2003.

COUNTER-STATEMENT OF THE CASE

Petitioner's recitation of the background facts of this case are laced with exaggeration and hyperbole. On March 26, 1995, Denise Arguello (sometimes referred to as "Arguello" or "Petitioner") and Alberto Govea (sometimes referred to as "Govea" or "Petitioner") stopped at a Conoco store in Fort Worth, Texas to purchase gasoline and beer. Arguello, after pumping her gas, went into the store to pay for the gas and to buy some beer (Pet. App. D at 16a). Cindy Smith, the clerk on duty, requested identification from Arguello for age confirmation and because she was paying with a credit card (Pet. App. D at 16a). After initially stating that she would not accept Arguello's out-of-state driver's license, Smith relented and rang up Arguello's purchases. (Pet. App. D at 16a).

During Arguello and Smith's discussion, but prior to any comments in any way referencing race or national origin, Govea, who was standing behind Arguello waiting to purchase his own beer, grew frustrated, left the beer he had intended to purchase on the counter, and left the store. (Pet. App. D at 16a). At this time, no racial slurs or remarks had been made. After Govea left the store, and after Arguello completed her purchases, the tension between Arguello and Smith escalated. (Pet. App. D at 17a). Nevertheless, Arguello testified at trial that Smith did not prevent her from purchasing her gas and beer, and that the only hindrance she

encountered in making her purchase was Smith's request for identification. (22 R. 128)[1]

As she was leaving the store, Arguello told Smith that she did not have to take it out on her if she did not like her job. (Pet. at 5). Arguello alleges Smith then referred to her as a "f_ _ _ ing Iranian Mexican bitch". (Pet. App. D at 17a). Arguello also alleges that, after she left the store, Smith began screaming racist remarks over the store's intercom. (Pet. App. D at 17a). At that point, Govea telephoned Conoco from a pay phone outside the store to lodge a complaint against Smith. (Pet. App. D at 17a).

Contrary to Petitioners' assertions, they were not prevented from purchasing the items they tried to purchase. (Pet. App. D at 21a-22a). Nor did Smith's conduct prevent Arguello from purchasing Govea's beer. (Pet. App. D at 21-22a). Likewise, contrary to Petitioner's implications (Pet. at 7-8), there was no record evidence that Conoco had some type of corporate policy allowing race discrimination against customers. Also contrary to Petitioners' recitation of the facts, (Pet. at 8), Smith in fact was warned in writing about her conduct. (23 R. 7).

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1. Arguello testified as follows:

Q. So she was not trying to prevent you from buying the beer at that point?

A. No.

Q. And even though she asked for a credit card and driver's license, she still completed the sale for you?

A. Yes.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW DOES NOT PRESENT A CONFLICT

The two cases that Petitioners assert are contrary to the Fifth Circuit's decision are *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862 (6th Cir. 2001) and *Garrett v. Tandy Corp.*, 295 F.3d 94 (1st Cir. 2002). To the contrary, the holdings and legal pronouncements in *Christian* and *Garrett* are entirely consistent with that of the Fifth Circuit in this case, and there is absolutely no split among the Circuits as to the application of § 1981 in the consumer context so as to justify Supreme Court review. *Id.* at 1118. Accordingly, far from suggesting a split among circuits, the *Hampton* court acknowledged its adherence to the precise line of authority relied on by the Fifth Circuit here.

While the Section 1981 consumer plaintiffs prevailed in *Christian*, the result turned entirely on the facts of the case, not on any interpretation of Section 1981. While the court in *Christian* devoted considerable attention to discussion of the proper showing for a *prima facie* case of discrimination in a § 1981 consumer case, there also was no issue as to the deprivation of a right protected by § 1981 that conflicts with the Fifth Circuit opinion in this case. The plaintiffs were escorted from the store *prior* to completing their purchases. Indeed, the case turned more on the sufficiency of the evidence of discriminatory intent than on whether there was an actual deprivation with a contractual interest. As the court observed, "[t]his case involves none of the difficulties that other courts have encountered in determining whether there was a valid contract interest at stake." *Christian*, 252 F.3d at 874, *citing Bagley v. Ameritech Corp.*, 220 F.3d 518 (7th Cir. 2001).

Petitioners focus on the *Christian* court's fashioning of a *prima facie* test as including proof that the plaintiff was either deprived of services or received services ". . . in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory." *Id.* at 872. The *Christian* court, however, consistent with the facts in the case, emphasized that the standard ". . . better comprehends the realities of commercial establishment cases in which an aggrieved plaintiff may have been asked to leave the place of business prior to completing her purchase, refused service within the establishment, or refused outright access to the establishment." *Id.* at 873. This present case contains no record evidence of any such deprivation or refusal of service. Accordingly, the plaintiffs in *Christian* were allowed to proceed with their § 1981 claims because they were ejected from the store and not allowed to complete their purchases. Petitioners here have no such evidence and *Christian* does not conflict with the Fifth Circuit's opinion.

Petitioners also contend that *Garrett v. Tandy Corp.*, 295 F.3d 94 (1st Cir. 2002), is contrary to the Fifth Circuit's decision. As in *Christian*, the *Garrett* court relied on precisely the same precedent cited in a Fifth Circuit decision in this case.[2] While the *Garrett* court took issue somewhat with the outcomes of the cases, it held squarely that the courts had utilized the proper legal standard and emphasized that "Congress did not intend to convert Section 1981 into a general prohibition against race discrimination."

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2. In particular, the *Garrett* court relied on the Fifth Circuit's prior decision in *Morris v. Dillard Dept. Stores, Inc.*, 277 F.3d 743 (5th Cir. 2001) and *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851 (8th Cir. 2001), *cert. denied*, 122 S. Ct. 1606 (2002). Petitioners wrongly assert that both of these cases are contrary to *Garrett* and *Christian*.

Garrett, 295 F.3d at 100. The court further held, consistent with *Youngblood* and the Fifth Circuit cases that, in order to bring a § 1981 claim, a retail customer must actually show he or she was actually denied the right to make, perform, enforce, modify or terminate a contract because of racial discrimination. *Id.* at 295-96. Accordingly, *Garrett* is entirely consistent with the Fifth Circuit's decision here.

II. THE DECISION BELOW WAS CORRECT

As the Fifth Circuit correctly stated, § 1981 does not provide a general cause of action for race discrimination. Section 1981 protects an individual's ability "to make and enforce contracts" on non-discriminatory terms. 42 U.S.C. § 1981(a). The federal courts have consistently held that, to establish a depravation of § 1981 rights in a retail context, a plaintiff must demonstrate "the loss of an actual, not speculative or prospective, contract interest". *See, e.g., Morris v. Dillard Department Stores, Inc.*, 277 F.3d 743, 751 (5th Cir. 2001).

Indeed, every federal Section 1981 case in the retail context, has held in one form or another that "there must have been interference with a contract beyond the mere expectation of being treated without discrimination while shopping." *Hampton v. Dillard Department Stores, Inc.*, 247 F.3d 1091, 1118 (10th Cir. 2001); *see also Garrett v. Tandy Corp.*, 295 F.3d 94, 100 (1st Cir. 2002) ("a retail customer must show that he was *actually* denied the ability either to make, perform, enforce, modify or terminate a contract by reason of a race-based animus") (emphasis added); *Youngblood v. Hi-Vee Food Stores, Inc.*, 266 F.3d 851, 854 (8th Cir. 2001), *cert. denied*, __ U.S. __, 122 S. Ct. 1606, 152 L. Ed. 2d 621 (2002) (a customer could not bring a claim against the store under Section 1981 because once the customer paid the cashier and received the purchase from

the cashier, neither party owed the other any duty under the retail sale contract); *Morris v. Office Max, Inc.*, 89 F.3d 411 (7th Cir. 1996) (to establish a 1981 claim, a customer must show he or she is engaged in an actual attempt to contract that was thwarted by the merchant). A plethora of district court cases have come to the same conclusion. (*See, e.g.*, *Rogers v. Elliott*, 135 F. Supp. 2d 1312, 1315 (N.D. Ga. 2001) and the cases cited therein.)

This court has already denied *certiorari* in the *Hampton* and *Youngblood* decisions. What the Petitioners are requesting this Court to do is overturn 15 years of consistent federal law, as well as the plain language of § 1981, and instead adopt an ill-defined, expansive concept of "making a contract" that would include far more than the purchase and receipt of goods and services and would turn Section 1981 into a general prohibition against racial discrimination. To do so would transform § 1981 into a general cause of action for race discrimination in all contexts in contravention of the plain language of the statute and congressional intent. The Fifth Circuit correctly declined to do so and correctly found that Arguello's § 1981 claim must fail as a matter of law because the evidence was undisputed that Arguello successfully completed her transaction and therefore cannot demonstrate any loss recoverable under § 1981.

The Fifth Circuit also correctly found that Govea's § 1981 claim must fail because he never attempted to enter into a contractual relationship with Conoco. While Govea was standing in line behind Arguello to purchase beer, Govea independently chose to leave his beer on the counter and leave the store without attempting to purchase the beer. While Govea did not purchase the beer, the evidence is undisputed

and uncontradicted that Smith did not prevent him from doing so. According to Govea's own testimony, he voluntarily set the beer on the counter and left without attempting to buy it.[3] Significantly, Govea left the store *before* the confrontation between Arguello and Smith escalated and Smith allegedly used racially derogatory language. (22 R. 131).

The Fifth Circuit's decision correctly states the applicable rule of law and faithfully applies that rule to the facts in the case. This decision does not so depart from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervisory power.

III. THE FIFTH CIRCUIT CORRECTLY APPLIED SECTION 2000a

The Fifth Circuit correctly held that Arguello and Govea were not entitled to injunctive relief without a showing that they were likely to suffer future injury by Conoco. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). The Court correctly held that a single altercation with a former Conoco employee that occurred over five years before the trial could not support the requirement that Petitioners were subject to an imminent threat of harm and that they would

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3. Q. And what did you do . . .

A. I said let's just get out of here, I mean it's not worth it.

Q. Okay. But Ms. Smith didn't stop you from making that purchase, you decided that, didn't you?

A. That's correct.

(22 R. 116-117).

likely suffer a future injury at the hands of Conoco. To the contrary, Govea voluntarily went into another Conoco store after this incident where Smith worked without incident. (Pet. App. F at 32a).

While Petitioners argue that this court's decision in *City of Los Angeles v. Lyons* should not apply to Section 2000a claims, a likelihood of substantial and immediate irreparable injury has long been a general requirement in all injunction cases. *See United States v. W.T. Grant Co.*, 345 U.S. 629 (1953); *O'shea v. Littleton*, 414 U.S. 488 (1974). The purpose of injunctive relief is to prevent future harm. *United States v. W.T. Grant Co.*, 345 U.S. 649 (1953). If there is no real and immediate threat of future harm, no injunction will stand under any statutory scheme. *See, e.g., Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1007 (11th Cir. 1997).

The well-established rule that a real and substantial likelihood of future harm must be shown before injunctive relief is proper has been applied not only to 2000a claims but many other types of civil rights claims as well. *See Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1007 (11th Cir. 1997) (applied to Section 2000a claim); *Hill v. Shell Oil Co.*, 78 F. Supp. 2d 764, 779 (N.D. Ill. 1999) (applied to Section 2000a claim); *LaRoche v. Denny's, Inc.*, 62 F. Supp. 2d 1366 (S.D. Fla. 1999) (applied to Section 2000a claim); *Lizardo v. Denny's, Inc.*, 2000 WL 976808 (N.D. N.Y. 2000) (applied to Section 2000a claim); *James v. City of Dallas*, 254 F.3d 551 (5th Cir. 2001, *cert. denied*, 122 S. Ct. 919 (2002)) (applied to multiple civil rights statutes dealing with racial discrimination in housing); *Griffith v. State of Colorado Division of Youth Services*, 17 F.3d 1323 (10th Cir. 1994) (applied to Section 2000e claim); *Spencer v. General Electric Co.*, 894 F.2d 651, 660-61 (4th Cir. 1990) (applied to Title VII claim).

Arguello and Govea presented no evidence that there was any likelihood of future discriminatory treatment by Conoco. Indeed, the complained of employee, Cindy Smith, left Conoco years before Petitioners requested injunctive relief. A single instance of discriminatory conduct by a long since departed employee provides scant motivation or authority to radically modify fifty years of law as to the proper standard for injunctive relief.

CONCLUSION

After considering the relevant facts and the applicable law, the Fifth Circuit properly held the Petitioners could not prevail under § 1981 and were not entitled to injunctive relief under Section 2000a. In doing so, it applied settled and rational principles of law established by this Court as well as other courts of appeals. This decision is not, as Petitioners suggest, an aberration that will send the civil rights world spinning off its axis. Rather, it is the proper application of sound and rational principles of civil rights law based on a full and fair consideration of the facts. This case raises no significant issues that warrant this Court's review and the Petition of *Certiorari* should be denied.

Respectfully submitted,

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